UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 10

NTN-BOWER CORPORATION,	)	
	)	
EMPLOYER,	)	
	)	
AND	)	
	)	
INTERNATIONAL UNION, UNITED	)	
AUTOMOBILE, AEROSPACE &	)	**CASE 10-RD-105644**
AGRICULTUREAL IMPLEMENT	)	
WORKERS	)	
OF AMERICA, AFL-CIO,	)	
	)	
UNION,	)	
	)	
AND	)	
	)	
GINGER ESTES, AN INDIVIDUAL,	)	
	)	
PETITIONER.	)	

UNION'S RESPONSE IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO HEARING OFFICER'S REPORT

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STATEMENT OF THE CASE

The background to the current petition is well-documented in the record of the case. The UAW has represented a unit of NTN employees at the Hamilton, Alabama, facility since 1976. The workers engaged in an economic strike from July 2007 until an offer to return to work in July 2008. In April 2011 the Board issued a decision finding that NTN violated the Act when it threatened strikers with loss of reinstatement rights, failed to offer reinstatement, surveilled union activities and denied the Union access to its bulletin board, unilaterally modified work schedules, and refused to provide requested information to the Union. *NTN-Bower Corp.*, 356 NLRB No. 141 (April 20, 2011). The parties petitioned for review/enforcement of the Board's decision in the D.C. Circuit Court of Appeals. While that case pending on review NTN withdrew recognition from the UAW on December 31, 2010. On February 12, 2012, an ALJ of the Board issued a decision in Case No. 10-CA-38816, applying the Board's analysis in *Master Slack Corp.*, 271 NLRB 78 (1984), to find that NTN's withdrawal of recognition and denial of access to Union representatives was unlawful. While review of the decision in Case No. 10-CA-38816 was pending before the Board, the parties entered into a mediated settlement agreement of all claims arising from the pending cases and by which NTN agreed to recognize the UAW (including application of the parties' 2008-2012 collective bargaining agreement). Petitioner Ginger Estes filed a petition for decertification that was administratively dismissed as premature (given its proximity to the settlement agreement). Petitioner's second petition for decertification resulted in a June 2013 election. This election was set aside by stipulation of the parties due to the employer's objectionable conduct. On November 1, 2013, the re-run election was held and the Union lost by two (2) votes. On November 8, 2013, these objections followed.

An order directing a hearing on the objections was issued by the Region on December 3, 2013. The hearing was convened on December 18, 2013, and adjourned on the same day. On January 9, 2014, the Hearing Officer issued her report and recommendation overruling the Union's Objections 1 and 3. The Hearing Officer recommended sustaining Union's Objection 2 regarding statements of NTN's management representative in a captive audience speech. Respondent filed exceptions to the Hearing Officer's report as to Union Objection 2.

STATEMENT OF FACTS

Pursuant to a May 22, 2013 petition by Petitioner Estes and the subsequent stipulation to set aside the June 2013 election, a second decertification election was held on November 1, 2013. On October 30, 2013, 48 hours before the election, Plant Manager Rufus McMillan gave a captive audience speech to each shift. During this speech he impliedly promised the employees a raise if they voted no. According to McMillan's own testimony, he told each group of employees that:

> "Hamilton is the only union plant. At [NTN's] Macomb [Illinois plant] there's no pressure to pay union dues and the Macomb associates make higher wages . . . The union has been here [Hamilton] for many years, yet Macomb makes more money than you do . . . The union has been here for the last year – how many raises have you received?"

Tr. 79, l. 7-13, 19-23; Tr. 80, l. 2-8, 9-15, 16-18. Every employee who testified confirmed that McMillan told them that the Macomb plant wasn't unionized and made higher wages. Tr. 35, l. 7-10; Tr. 38, l. 14-17; Tr. 42, l. 15-25; Tr. 47, l. 18-19; Tr. 53, l. 18-24. There was also testimony that McMillan told the employees that the union had held up their raises in four months of bargaining (which was demonstrably untrue). Tr. 57, l. 18-25; Tr. 58, l. 1-6.

ARGUMENT

I. Under the Deferential Standard of Review, the Hearing Officer's Report is Due to be Sustained

NTN argues that the Hearing Officer's conclusion that McMillan made an implied promise of benefits if the employees voted out the union is "factually erroneous." Brief in Support of Exceptions at 5. The Hearing Officer's decision, however, was based on her review of the evidence and testimony, and her credibility determinations. Specifically, the Hearing Officer found that "based on his admissions, demeanor and inconsistent testimony, where McMillan's testimony may be considered as conflicting with that of the employee witnesses, I credit the employees' testimony over that of McMillan." Hearing Officer's Report at 9, n.7. The Employer has presented no basis to overrule the Hearing Officer's credibility determinations, and they should not be overruled on review. *See, e.g., Gibson's Discount Center,* 214 NLRB 221 (1974), *citing Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*. 188 F.2d 362 (3d Cir. 1951). Credibility determinations, and the findings dependent upon them, are not lightly overturned on review by a body without the benefit of the live testimony. The standard of review is highly deferential. *NLRB v. APL Logistics, Inc.,* 142 Fed. Appx. 869, 873 (6th Cir. 2005) ("the Board's decision not to set aside the election on this ground rested primarily on credibility determinations made by its hearing officer. Therefore, our review of the Board's decision is *highly deferential*.") (emph. supp.). NTN asks the Board to make different credibility determinations than the Hearing Officer to find that McMillan's testimony was more credible than the employees'. Hearing Officer's Report at 9, n.7 (finding that employees' testimony was more credible where it conflicted with McMillan's testimony). Further, the Employer asks the Board to find that there was not substantial evidence to support a finding that McMillan's captive

audience speech impliedly promised higher wages if the employees voted out the Union. The Hearing Officer's determinations were "cogent and well-supported" and the Employer presents no reason to overturn her decision beyond mere disagreement with the final outcome. *Bell Foundry Co. v. NLRB,* 827 F.2d 1340, 1343 (9th Cir. 1987).

II. The Hearing Officer Properly Applied Established Board Law

The Company argues that the case law relied upon by the Hearing Officer is "entirely irrelevant" and "unfathomable." Brief in Support of Exceptions at 3-4. The Hearing Officer, however, applied clear precedent to the facts established by McMillan's own testimony, and those of the employee witnesses. NTN appears to argue that *Langdale Forest Products Co.,* 335 NLRB 602 (2001) controls and no other case law is applicable. However, *Langdale,* contrary to the Employer's characterization, only applies "absent threats or promise of benefits." *Langdale Forest Products Co.,* 335 NLRB at 602. Here, the Hearing Officer found, based on witness testimony and credibility determinations, that McMillian's captive audience speech impliedly promised benefits in the form of higher wages if the Hamilton plant was non-union. Hearing Officer's Report at 9. The crux of this case is whether or not the captive audience speech implied a benefits if the employees voted against union representation.[1] Based on her consideration of the evidence, including determining the credibility of live witnesses, the

[1] The UAW submits that any captive audience speech of the type at issue in this case is per se objectionable. *See 2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (Dec. 29, 2011) (Member Becker, dissenting in part). Member Becker's analysis is particularly pertinent in a case such as this where the speaker repeatedly went "off script" in a captive audience speech only 48 hours before a second decertification election -- a re-run election by stipulation following objectionable employer conduct -- involving an employer with a long history of egregious misconduct.

Hearing Officer found an implied promise of a benefit and appropriately sustained the UAW's objection on those grounds.

The Employer notes that the Hearing Officer cites both *Enterprise Leasing Co.*, 359 NLRB No. 149, 2013 WL 3346891 (2013), and *G&K Services, Inc.*, 357 NLRB No. 109 (2011). NTN argues that "*G & K Services, Inc.* was not cited with approval or as support, for the decision reached by the Board in *Enterprise.*" Brief at 4. However, the Administrative Law Judge in *Enterprise* did favorably cite *G & K Services,* and the Hearing Officer properly relied on this established precedent in reaching her decision. In *Enterprise,* it was the Employer that was chastised by the ALJ for citing to *G&K Services* as supporting the position that there was no implied promise made. The ALJ found that *G&K Services* supported the union's position. The ALJ stated that "the case cited by the Respondent in its postbrief submission of relevant recent case law is distinguishable. In *G & K Services,* 357 NLRB No. 109 (2011), the Board addressed the issue whether an employer's preelection statement to employees regarding whether the benefits available at nonunion facilities would be available to them if they decertified their union was objectionable conduct warranting a new election." *Enterprise Leasing Co.*, 2013 WL 3346891 at *15. *G&K Services* directly supports the Union's position in this case and was properly cited by the Hearing Officer as standing for the proposition that pre-election promises of benefits are unlawful, and are properly the basis for ordering a rerun election. The ALJ in *Enterprise* held:

> "Although an employer may compare union and nonunion benefits and make statements of historical fact . . . even comparisons and statements of fact may, depending on their precise contents and context, nevertheless convey implied promises of benefits." 357 NLRB No. 109, supra, slip op. at 2, and case cited there. In *G & K Services, supra,* applying precedent, a majority of the Board found the employer's conduct objectionable."

Enterprise Leasing Co., 2013 WL 3346891 at *15 (ALJ's Findings of Fact). In both *Enterprise Leasing* and *G&K Services*, the Board found that the Employer went beyond making truthful and lawful comparisons and unlawfully made implied promises of benefits if employees voted out the Union.[2] The Hearing Officer correctly applied these cases to the Employer and sustained the Union's Objection 2 and ordered a rerun election due to the Employer's implied promises of benefits if the employees voted out the Union.

CONCLUSION

Based on the above and foregoing, the UAW respectfully submits that the Hearing Officer's Report and Recommendations regarding Objection 2 are due to be sustained and an appropriate order directing a third election is due to follow.

Respectfully submitted,

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[2] A decertification petition was at issue in *Enterprise Leasing.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed with the National Labor Relations Board and served on the parties listed below by e-mail and/or U.S. Mail this the 28th day of January, 2014:

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